77885-0

Court of Appeals No. 237761

75338-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MICKEY BROWN, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE JAMES M. MURPHY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

Court of Appeals No. 237761

75338-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MICKEY BROWN, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE JAMES M. MURPHY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

TABLE OF AUTHORITIES

WASHINGTON CASES

STATUTES

I.

ASSIGNMENTS OF ERROR

The defendant has enumerated seventeen assignments of error which cover three pages. For the sake of brevity, they will not be repeated here.

II.

ISSUES

A. IS THE STATE REQUIRED TO PROVE "SURPLUS" ITEMS IN AN INFORMATION?

B. ARE ERRONEOUS FINDINGS OF FACT "REVERSIBLE ERROR?"

C. WAS THE DEFENDANT "ARMED" FOR THE PURPOSES OF COMMITTING FIRST DEGREE BURGLARY?

D. DID THE TRIAL COURT ERR IN CALCULATING THE DEFENDANT'S CRIMINAL HISTORY SCORE?

E. HAS THE DEFENDANT SHOWN THAT HIS TRIAL COUNSEL WAS "INEFFECTIVE?"

III.

STATEMENT OF THE CASE

The defendant was charged by information with one count of first degree burglary and one count of intimidating a witness. CP 1-2. The defendant waived jury trial and proceeded to a bench trial.

On August 6, 2001, Mr. Craig Ambacher arrived home at approximately 4:30 PM and noticed a green Taurus parked across the street from his residence. RP 17.[1] Mr. Ambacher thought the car was unusual for that neighborhood. RP 17. Upon opening the garage door, Mr. Ambacher noticed a drill in the middle of the garage floor. RP 17. He had to get out of his vehicle to move the drill so he could park in the garage. RP 17. As he did so, he noticed that the back door was ajar. RP 18.

Inside the house, Mr. Ambacher found that many of the contents (including a strongbox) of the residence were ransacked and he found his luggage with items from his home placed inside. RP 19-26. The rear slider door was open and Mr. Ambacher theorized that the burglars went out the sliding rear door as he was coming in the front door. RP 19.

---

[1] There are several transcripts for this case. The transcript containing the trial will be designated simply as "RP [pg. no. #]. The subsequent fact finding hearing transcript will be designated "Hrg. RP [pg. no. #] Other transcripts will be designated by name of event followed by the page number.

Among other disturbed items, Mr. Ambacher found that one of his rifles had been moved from the closet to the bed in one of the bedrooms. RP 19-20. Mr. Ambacher was certain the rifle was in the closet when he got dressed for work that morning. RP 20.

Mr. Ambacher found that his back door had been kicked in and there was a footprint left on the door. RP 27.

Shortly after calling 911, Mr. Ambacher was discussing the situation with his wife on the phone when another car pulled up by the Taurus. RP 29. One passenger got out of the car, stuck out her tongue at Mr. Ambacher and drove away in the Taurus. RP 30. Mr. Ambacher noted the license plate on the new car. RP 30.

Deputy Jeffrey Mitchell, a Spokane Sheriff's Office was able to trace the second vehicle (a Dodge Neon) to a Karen Singley. RP 48. She reported that her son, Harrell Singley was driving that car on the day in question. RP 48. Mr. Singley led the deputy to a suspect address, but Dep. Mitchell did not proceed further. RP 50.

Mr. Harrell Singley testified that on August 6, 2001, he and Ms. Melissa Hill had been friends for about a week. RP 58. Mr. Singley gave Ms. Hill a ride to the doctor's office on August, 6, 2001. RP 58. When he picked Ms. Hill up, Mr. Singley noted a greenish Taurus outside Ms. Hill's residence where she was living with another woman named "Kim."

RP 59. When Mr. Singley returned Ms. Hill to her residence at approximately 3:30 PM, the Taurus was not longer present. RP 59. Mr. Singley testified that he was still at Ms. Hill's residence when "Mickey and Lenny" arrived. RP 60. The duo was dripping with sweat and had no shirts on. RP 60-61.

Mr. Singley was asked to transport "Kim" to the Taurus as it was "out of gas." RP 62. Mr. Singley noted that no one brought any gasoline and there was no stop to purchase gasoline. RP 63. When they arrived at the Taurus' location, Mr. Singley saw a man standing in his driveway using a telephone. The man was watching his car. RP 63. Mr. Singley thought that was odd. RP 63. "Kim" got out of Mr. Singley's car and went to the Taurus. No gasoline was put in the Taurus and it started easily. RP 63-64.

Mr. Singley made an in-court identification of the defendant as the person he knows as "Mickey." RP 68.

On August 6, 2001, Melissa Hill was living with her cousin Kim Brown and her significant other, Mickey Brown. RP 83. Ms. Hill recalled getting a ride to the doctor's office from Mr. Singley. RP 84. She noted that the green Taurus was not home when she returned from the doctor's visit. RP 90.

Ms. Hill testified that "Mickey and Lenny" came home sweaty and went downstairs to talk to Kim Brown. RP 87-88. At one point Ms. Hill went into the basement and heard the trio discussing "...the house that they broke into." RP 88. She heard the defendant say that "...the people had came [sic] home and they left." RP 89. Ms. Hill heard a discussion about hearing the garage door open or a car pull up. RP 89. Ms. Hill heard discussion about guns that the defendant and "Lenny" had seen and how the guns were "nice." RP 89-90. Ms. Hill was not sure which person made the statement, but she heard someone state that they wished they could have gotten the guns. RP 90. Ms. Hill also overheard conversation regarding having to run home after the burglary. RP 93. The defendant stated that he had jumped over fences on the way back from the burglary. RP 101.

In telephone conversations between Ms. Brown and Ms. Hill, Ms. Hill could hear the defendant in the background stating that he knew what he did was wrong. RP 104.

The defendant told Ms. Hill that she would "pay" if she ever talked to the police. RP 101. Ms. Hill took the threat seriously. RP 102.

Ms. Hill made an in-court identification of the defendant as the person she knows as Mickey Brown. RP 105.

Det. Douglas Marske of the Spokane County Sheriff's Office did follow-up investigation on this case. RP 123. The information provided by Harrell Singley led to Kim and Mickey Brown's residence. RP 124. That residence is six or seven blocks from the victim's residence. RP 125. When Det. Marske heard that the second suspect's name was "Lenny," he recalled that he had investigated an earlier, unrelated burglary in which Lenny Brown was a suspect. RP 125. Mr. Singley picked Lenny Brown from a photomontage as the second person involved. RP 126.

Det. Marske interviewed Ms. Hill and determined he had probable cause to arrest the defendant and Lenny Brown. RP 130.

The defendant called one witness, Mr. Michael Hill. RP 158. He stated that he is Ms. Hill's brother. RP 158. Mr. Hill testified that Ms. Hill did not have a good reputation for truthfulness. RP 160.

The defendant absconded in the middle of trial and was arrested in Oregon some weeks later. Sent. RP 198, 199. The trial court found the defendant guilty as charged. RP 193.

IV.

ARGUMENT

A. THE STATE IS NOT REQUIRED TO PROVE SURPLUS ITEMS IN AN INFORMATION.

The defendant argues that the State did not prove that there was an "official proceeding" pending at the time the information was filed. Brf. of App. 20. This argument is based on the fact that the information contained outdated language from former RCW 9A.72.100(1)(1994).

Currently, the intimidating a witness statute says nothing about an "official proceeding."

RCW 9A.72.110 reads, in part,

> (1) A person is guilty of intimidating a witness if a person, by use of a threat against a current or prospective witness, attempts to:
>
> (a) Influence the testimony of that person;
>
> (b) Induce that person to elude legal process summoning him or her to testify;
>
> (c) Induce that person to absent himself or herself from such proceedings; or
>
> (d) Induce that person not to report the information relevant to a criminal investigation or the abuse or neglect of a minor child, not to have the crime or the abuse or neglect of a minor child prosecuted, or not to give truthful or complete information relevant to a criminal investigation or the abuse or neglect of a minor child.

> (2) A person also is guilty of intimidating a witness if the person directs a threat to a former witness because of the witness's role in an official proceeding.

RCW 9A.72.110.

Up until 1997, RCW 9A.72.110 read, in part:

> (1) A person is guilty of intimidating a witness if a person directs a threat to a former witness because of the witness' testimony in any official proceeding, or if, by use of a threat directed to a current witness or a person he or she has reason to believe is about to be called as a witness in any official proceeding or to a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child, he or she attempts to:

Former RCW 9A.72.110 (1996).

The information in this case reads:

> Count II: INTIMIDATING A WITNESS, committed as follows: That the defendant, MICKEY WILLIAM BROWN, in the State of Washington, on or about August 29, 2001, by use of a threat directed to Melissa Hill, a person that the defendant had reason to believe was about to be called as a witness in an official proceeding, did attempt influence [sic] the testimony of such person.

CP 1-2.

The record is silent on why the outdated language found its way into the information. However, the information does charge the defendant with directing a threat to a witness in an attempt to influence the testimony of the witness. This is a statement of the elements under the current

RCW 9A.72.110(1)(a). The language regarding an "official proceeding" is simply surplus language.

The defendant makes no claim that the information was inadequate to advise him of the charges or that the information was missing any elements of the statutory charge. Further, he does not claim he was confused. His defense was that he did not do it. Trial RP 188. Defendant's claim is that the State failed to prove everything in the information, regardless of whether the information contains items not in the current applicable statute. Brf. of App. 20. The defendant is incorrect.

The defendant's entire argument is predicated on a mis-interpretation of the law. The crux of the defendant's error is that he has neglected to take into account that this case was *not* tried to a jury. It is the *jury instructions* that convert surplus language in the information into an element that the State must prove. If the trial is a bench trial, any surplusage in the information is exactly that: surplusage.

> The defendants argue, however, that if the State includes an item in the information it becomes an element that must be proved by the State. The defendants rely on *State v. Worland*, 20 Wn. App. 559, 582 P.2d 539 (1978) and *State v. Barringer,* 32 Wn. App. 882, 650 P.2d 1129 (1982) for this proposition. Their reliance is misplaced. In those cases the added elements were also included in instructions to the jury, at which time they became the law of the case. *Worland*, at 565-66; *Barringer*, at 887-88. Here the defendants had waived a jury trial and the rule in *Worland*

> and *Barringer* is inapplicable. *See State v. McGary*, 37 Wn. App. 856, 860, 683 P.2d 1125 (1984).

The Washington State Supreme Court has consistently discarded surplus language in an information so long as the defendant is not misled or confused by the language. *State v. Stritmatter*, 102 Wn.2d 516, 524, 688 P.2d 499 (1984). In *State v. Miller,* the defendant argued that because the information stated that the gun used in the assault was .38 caliber, the State had to prove that the gun was .38 caliber. *State v. Miller*, 71 Wn.2d 143, 145, 426 P.2d 986 (1967). The Court held that the caliber of the gun was not part of the elements of the crime and was surplusage. The State was not required to prove the surplusage. *Id.* at 146.

A judge in a bench trial is presumed to know and apply the correct law.

> But it must be remembered that this was a trial to the court. It can safely be assumed that the trial court judge recognized the questions for what they were and disregarded any improper material produced thereby in reaching a decision. *See State v. Bell*, 59 Wn.2d 338, 368 P.2d 177 (1962).

State v. Adams, 91 Wn.2d 86, 93, 586 P.2d 1168 (1978).

The defendant's assertions that the State had to prove that there was an official proceeding pending at the time of the intimidation are wrong and his arguments fail.

B. ERRONEOUS FINDINGS THAT DO NOT AFFECT THE OUTCOME ARE "HARMLESS ERROR."

The defendant alleges that three findings of fact made by the trial court are erroneous and not supported by the record. Brf. of App. 31.

The first of the findings argued by the defendant is that the defendant did not "beat" his wife, he only "hit" her. Brf. of App. 31. The record indicates that the defendant "hit" his wife. RP 188-19. The State sees scant difference between those two terms. The finding is supported by the record.

The second allegation of an erroneous finding of fact is that the trial court found that the "...defendant pounded his fist against the wall...." The State concedes that there is no support in the record for this finding of fact.

The last alleged error is a finding that reads, "...at some point [Mickey Brown] had to be restrained by Lenny Brown to protect Melissa Hill from physical harm." Brf. of App. 32. The State also concedes that there is no support in the record for this finding.

However, as the defendant concedes, none of these errors affects the outcome of the case. Brf. of App. 31. They are quintessential "harmless error." *State v. Caldera*, 66 Wn. App. 548, 551, 832 P.2d 139 (1992) ("...[A]n erroneous finding of fact not materially affecting the

conclusions of law is not prejudicial and does not warrant a reversal.") Because the errors in findings of fact are completely without effect on the outcome of any issue of consequence to this case, there is no need to reverse for correction. The law does not require the doing of a useless act. *McAlmond v. Bremerton*, 60 Wn.2d 383, 386, 374 P.2d 181 (1962) (the law abhors the doing of a useless act.)

C. THE DEFENDANT WAS "ARMED" AT THE TIME HE WAS COMMITTING A BURGLARY WHICH ELEVATES THE CRIME TO FIRST DEGREE BURGLARY.

The defendant claims that he was not "armed" during the burglary and therefore the evidence is insufficient to support his conviction on the charge of first degree burglary. Additionally, for the same reasons, the defendant believes he should not have been sentenced to a weapons enhancement.

The defendant takes a global approach to the facts and claims that the facts do not meet a three part test proposed by the defendant. The defendant extracts his three part test from *State v. Schelin*[2], *State v. Johnson*[3] and others. The problem with the defendant's arguments

---

2 *State v. Schelin*, 147 Wn.2d 562, 55 P.3d 632 (2002).

3 *State v. Johnson*, 94 Wn. App. 882, 974 P.2d 855 (1999).

lies in the fact that the arguments lack an appreciation for *when* the crime of first degree burglary occurs.

In this case, the defendant had already committed burglary by the time he went into the bedroom in which the guns were found. The State does not expect that the defendant seriously contests this point. At the time the residential burglary was occurring, the defendant removed a rifle from the closet. At that point, several potential legal issues all came to fruition. The defendant had actual, physical possession of a firearm. The defendant reduced that firearm to his control. He removed the firearm from where the rightful owner had placed it and moved it to the bed. The defendant exercised dominion and control over the firearm. At that very moment, the residential burglary, which had been in progress, became elevated to a first degree burglary.

The defendant approaches his argument using caselaw from drug cases. Neither *Schelin* or *Johnson* involves the issue to be resolved here. Those cases were examining the parameters of being "armed" when the defendant is not actually holding the weapon at the time of the crime. Part and parcel of those discussions is the question of exactly when the crime ocurred as it is not clear when the crime is a drug crime. That is not at issue in this case.

There is no need to examine whether there was a "nexus" in this case. It is obvious: The defendant (or his partner) put his hand on the rifle. At the time the rifle was touched, the defendant was in the actual process of burglarizing the residence. There is no need for a "distance analysis," or "access analysis" or any other more elaborate contemplation. All the nexi came together at the instant the defendant picked up the rifle.

There is no caselaw or statute that indicates that a person has to be armed for a specific period of time before he or she is deemed "armed." The defendant became "armed" at the instant he took control of the rifle. Because he took control of the rifle while in the process of a residential burglary, the crime became a first degree burglary. Because the defendant was armed at the time he moved the rifle to the bed, he was armed for the purpose of a firearms enhancement. Arguing about nexi and whether or not the defendant was "armed" is only germane to those times *after* the defendant had placed the rifle on the bed. No matter the outcome of those arguments, none of the defendant's ideas change the fact that at the moment the defendant had his hand on the rifle, he was clearly "armed." The fact that he later may (or may not) have become unarmed does not change the event of taking possession of the rifle. The defendant has not presented any caselaw supporting an "on again/off again" version of first

degree burglary. Once he picked up the rifle, the crime of first degree burglary vested.

The defendant cannot keep converting the crime from residential burglary to first burglary and back again by picking up and putting down the rifle. Once he was armed, the residential burglary was elevated to first degree burglary. If one wanted to get down to brass tacks, the information filed by the State could be viewed as having charged that specific time frame wherein the defendant had direct possession of the rifle.

The defendant argues that the "only" time the rifle was "easily accessible and readily available for use" was when the defendant or his partner were actually in the bedroom with the rifle. Brf. of App. 26. Whether or not this is a correct statement, the defendant fails to acknowledge that he concedes the argument with this statement. The defendant could not be in the bedroom (where the defendant concedes that the rifle was "easily accessible" and "readily available") unless the defendant was also in the process of a residential burglary at that time. The defendant appears to be under the impression that first degree burglary occurs at the time the defendant is arrested. This position would be consistent with the defendant's analyses extracted from *Schlien, et al,* but is not appropos to this first degree burglary charge.

The fact of reduction to actual possession is the fact that distinguishes this case from the defendant's hypothetical involving the burglary of a residence with a gun case full of guns. The defendant proposes that this case is tantamount to convicting defendants simply because they burgled a house that contained a display case with guns. The defendant's argument does not apply to this case because the defendant did not simply break into a house containing guns. The defendant took possession of a rifle.

If this case involved the defendant breaking into a house, stealing firearms, loading them into his car and driving away, it is unlikely the defendant would claim a lack of evidence of being "armed." The only difference between that scenario and the actual set of facts is that the defendant was interrupted in mid-steal. A logical and rational trier of fact could easily conclude that the defendant placed the weapon on the bed for the purposes of collecting it on the way out of the house. There are scant innocent explanations for removing a rifle from a victim's closet and placing it on the bed.

The defendant's arguments are a call to end the charge of first degree theft when the firearms are obtained inside the building.

The defendant in *State v. Hall* argued that taking possession of a firearm during the course of a residential burglary did not constitute being

"armed" for the purposes of the first degree burglary statute. *State v. Hall*, 46 Wn. App. 689, 732 P.2d 524 (1987) *review denied*, 108 Wn.2d 1004 (1987). The *Hall* court rejected this idea, holding that while transporting the weapons from the house to the suspect's car, the guns were "easily accessible and available." *Id.* at 695. The *Hall* court also stated that while the defendant was transporting the guns, he was in actual possession of the guns and this is more than is required to be considered "armed." *Id.* at 695-96.

The court in *State v. Speece* reiterated the logical position that a burglar cannot take a firearm without that firearm also being deemed readily accessible and easily available. *State v. Speece*, 56 Wn. App. 412, 416, 783 P.2d 1108 (1989) *affirmed*, 115 Wn.2d 360, 798 P.2d 294 (1990) [defendant "armed" even though gun completely disassembled].

There is little to distinguish this case from *State v. Faille*, 53 Wn. App. 111, 766 P.2d 478 (1988). In *Faille*, the defendants took unloaded guns from the house being burgled and placed the guns in bushes outside the home. *Id.* at 112. The ammunition in the home was not taken. *Id.* at 112. In spite of the fact that the defendant only carried the guns outside to the bushes, the court upheld his conviction for first degree theft. The court found that, "...Faille removed the guns from the house and placed them

outside in the bushes. Thus, during the burglary the guns were readily accessible." *Id.* at 114-15.

In comparing the acts of taking guns and placing them in bushes outside the house, or taking a gun and placing on a bed inside the house, only the number of seconds in actual, physical possession appear to be different. If anything, a gun on a bed *inside* the house where the burglary is occurring is more "readily accessible" and "easily accessible" than guns stored outside in bushes. In the present case, the defendant needed only to pick up the gun. If the guns are outside in the bushes, the defendant would have to get outside the house and then find the guns in the bushes. However, the major point remains: the act of taking the guns becomes the act that makes the defendant "armed" for the purposes of first degree burglary. The facts of *Faille* do not say whether the guns were ever retrieved from the bushes by the defendants or whether they were apprehended in mid-burgle. That does not matter, just as the fact that the defendant in this case was scared away prior to absconding with the rifle.

D. THE TRIAL COURT ERRED IN CALCULATING THE DEFENDANT CRIMINAL HISTORY SCORE.

The defendant raises an argument that his sentencing was incorrect because his criminal history score was calculated incorrectly. The

defendant's claim is based on the inclusion of juvenile crimes prior to the defendant reaching age 15 and claims that certain Class C felonies in the defendant's history have "washed out."

The State concedes that the defendant's criminal history score should not include juvenile criminal history with offense dates prior to the defendant reaching age 15. This case should be remanded for resentencing with the proper criminal history score.

As for the claim that there are Class C felonies that should have "washed out," the record is not sufficiently developed below as the issue was not raised below. The State concurs with the defendant's request for a remand for resentencing. At that time, the issue of "washout" of the Class C felonies can be addressed. No amount of "addressing" will change the outcome of the juvenile criminal history. It is not countable under *State v. Smith*, 144 Wn.2d 665, 30 P.3d 1245 (2001).

Lastly, the defendant assigns error to the trial court's refusal to hear the defendant's post-trial motions on sentencing. If this court does remand for resentencing, defendant will receive the redress he sought in his *pro se* post-trial sentencing motions. Should this case be remanded for resentencing, the denial of post-trial sentencing motions issue will be moot.

E. THE DEFENDANT HAS NOT SHOWN THAT HIS COUNSEL WAS "INEFFECTIVE."

The defendant asserts that his counsel was ineffective for multiple reasons. The defendant has not made the requisite showing to sustain his burden on appeal.

> To show ineffective assistance of counsel, the defendant must show that counsel's performance was deficient, and that such deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). And to show prejudice, "'[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Lord*, 117 Wn.2d 829, 883-84, 822 P.2d 177 (1991) (quoting *Strickland*, 466 U.S. at 697) (alteration in original). Moreover, because the defendant must prove both ineffective assistance and resulting prejudice, a lack of prejudice will resolve the issue without requiring an evaluation of counsel's performance. *Lord*, 117 Wn.2d at 884.

State v. Aaron, 95 Wn. App. 298, 305, 974 P.2d 1284 (1999).

The defendant has not met his burden to show that the actions (or non-actions) of his defense counsel, resulted in prejudice.

The defendant's first alleged example of deficient representation is based on the claim that defense counsel did not "inform the court of the law regarding the intimidation count..." Brf. of App. 39. The defendant claims that trial counsel should have been complaining to the court that the State was not showing that an official proceeding was pending at the time of the intimidation. The defendant claims that such was the law that

"...should have been applied to the case." Brf. of App. 39. This argument is based on the premise that the defendant's earlier arguments on "pending official proceeding" were actually correct. As shown previously, the defendant's arguments on this point are incorrect.

The defendant claims the prejudice was being wrongly convicted. This issue was dealt with previously and is simply being reprised here under the guise of an ineffective assistance of counsel argument.

The next claim of ineffective assistance of counsel involves an allegation that defense counsel did not "...present to the trial court the law regarding what is required to be armed..." Brf. of App. 40. Firstly, this case was a bench trial and the trial court is presumed to know the law. Each side can certainly urge the trial court to adopt whichever view is deemed advantageous by a party, but the court supplies its own law. *State v. Adams*, 91 Wn.2d at 93.

In order to prevail on this point, the defendant must show that the trial court would have come to a different decision had trial counsel "presented" more law to the court. This cannot be shown on the record below.

The same situation is present in defendant's argument regarding defense counsel's abortive "ammunition" arguments. The defendant

cannot show that raising (or not raising) issues regarding the presence or absence of ammunition had any effect on the outcome of the trial.

The defendant repackages his prior arguments regarding being "armed" by claiming that defense counsel apparently failed to research the issue and that defense counsel seemed ignorant that existing law supported the defendant's position. Stripped of ephemera, the defendant's argument is that defense counsel should have taken the same position as does the defendant in this appeal. Since the defendant's position is incorrect, it is not defective representation to fail to raise such an argument.

Further, it is difficult to find prejudice on the record when the defendant was, in fact, armed under the law of this state. No amount of argument or research on the part of the defense counsel would change the facts of the case. The facts of the case show that the defendant was armed as shown previously.

The defendant next argues that his counsel should have argued that the findings of fact and conclusions of law were incorrect. Brf. of App. 42. Like the other arguments, this one assumes that the defendant's arguments on appeal are correct.

The defendant makes the dubious claim that defense counsel's "...timely objections would have cleared up these problems and, possible, resulted in acquittals...." Brf. of App. 42. "Possibly" is not the showing

that must be made. Anything is "possible." The defendant must show that, "...but for the ineffective assistance, there is a reasonable probability that the outcome would have been different." *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694.

The idea that the defense counsel can change the outcome simply by objecting to findings is simplistic at best. The defendant has not shown that there is a reasonable probability that the outcome would have been different had defense counsel raised objections on the record.

The defendant also asserts that his counsel was ineffective for failing to object to the defendant's sentencing score calculations. Since the defendant's score will be correctly determined when this case is remanded for re-sentencing, this issue is moot.

Lastly, the defendant reprises his "pending official proceeding" argument yet again by claiming that defense counsel should have filed post-trial motions. As has been noted twice before, this argument subsumes that the "pending official proceeding" argument has merit. Since it does not, the defendant cannot show that any prejudice resulted from a failure to file motions.

It should also be noted that the defendant departed for parts unknown in the middle of the trial. The defendant on appeal does not explain exactly how a defense counsel could pursue such motions with the client in bench warrant status. Defendant presents no rational reason to believe that any Superior Court would entertain post-trial motions while a bench warrant is pending for the defendant.

The defendant had no right to counsel at post-trial collateral proceedings. *State v. Winston*, 105 Wn. App. 318, 321-22, 19 P.3d 495 (2001). A motion for a new trial or for arrest of judgment is a collateral attack. *In re Pers. Restraint of Becker*, 143 Wn.2d 491, 20 P.3d 409 (2001). Since the defendant was not entitled to counsel in the first place, he can hardly complain that his counsel was ineffective.

The defendant must show that the missing post trial motions would have succeeded. Even in the unlikely event that a court would hear the motions in the defendant's absence, the court hearing the motions would likely have been the same court that decided the bench trial in the first place. The State respectfully submits that it is a rare judge that grants a new trial or an arrest of judgment on a bench trial that he or she conducted. To grant such a motion is to tell the world that a mistake of serious proportions was committed by the judge. Again, the standard

applicable to these instances is that the outcome *probably* would have been different, not a "remote possibility" the outcome would be different.

The defendant asks this court to find that even if the individual alleged errors by counsel do not show counsel was ineffective, then the court should aggregate the alleged errors to make one big ineffective claim. Defense counsel claims that the cumulative error doctrine applies by analogy. The attempted analogy does not work.

The defendant attempts to apply the logic of *State v. Greiff*, 141 Wn.2d 910, 10 P.3d 390 (2000) that small errors can accumulate to render a trial unfair. The defendant is essentially finding fault because defense counsel did not operate from the theories now being put forth on appeal. The State has already shown how none of the alleged errors during the trial phase resulted in any prejudice to the defendant. Several of the supposed errors made by defense counsel involve post-trial issues. Errors made *after* the trial cannot be said to render the *trial* unfair. The State showed when these issues were put forth by the defendant that his arguments were defective. Aggregating defective claims does not improve their validity. There are no errors to accumulate.

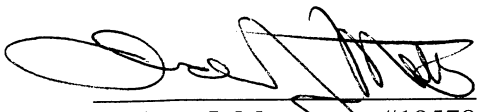
V.

CONCLUSION

For the reasons stated, the convictions of the defendant should be affirmed.

Dated this 1st day of November, 2004.

STEVEN J. TUCKER
Prosecuting Attorney



Andrew J. Metts #19578
Deputy Prosecuting Attorney
Attorney for Respondent